Supreme Court, U.S.
FILED

01 119 JUL 17 2001

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No. 01-

IN THE
Supreme Court of the United States

NEIL BARTON,

Petitioner,

v.

SUSAN AU-YANG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION TWO

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment require restitution to a defendant of property transferred in satisfaction of an erroneous judgment later vacated on appeal and remanded for retrial, unless the continued deprivation of the defendant's property pending retrial is justified by a judicial hearing to determine whether the plaintiff will likely prevail on the merits in accordance with this Court's standards for prejudgment attachments and garnishments?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the California Court of Appeal for the First Appellate District filed February 26, 2001 is unpublished. It is found in Appendix A.

STATEMENT OF JURISDICTION

A petition for review of the decision of the Court of Appeal was timely filed with the California Supreme Court on April 6, 2001, pursuant to California Rule of Court 24 and 28(b) (West Supp. 2001). Review was denied in an order filed on April 18, 2001. A copy of the order is found in Appendix C. The jurisdiction of the Supreme Court of the United States is invoked by 28 U.S.C. § 1257(a) (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

California Code of Civil Procedure § 908 reads in full:

> When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination.

Cal. Civ. Proc. Code § 908 (West 1980)

STATEMENT OF THE CASE

The constitutional issue presented herein arose when California's courts summarily denied petitioner restitution and accounting of his life's savings of $174,245.45 which was taken from him by state action as a result of a post judgment writ of execution in satisfaction of an erroneous judgment that was later vacated when the case was reversed and remanded by the California Supreme Court to the Superior Court of Marin County for retrial. *Au-Yang v. Barton*, 21 Cal. 4th 958, 90 Cal. Rptr. 2d 227, 987 P.2d 697 (1999).

The Underlying Case: The underlying action arises from a 1991 contract between petitioner Neil Barton and respondent Susan Au-Yang, according to which Mr. Barton

built a deck at respondent's home for a total cost of $28,501.31. Alleging negligence in his performance of the work, respondent in 1992 sued petitioner seeking damages " 'in excess of $60,000.' " He cross-complained alleging fraud, among other claims. 987 P.2d at 697-98. In May, 1995, respondent obtained from the Marin Superior Court an *ex parte* writ of attachment on petitioner's Washington State home. The writ purported to secure the sum of $80,000. That writ was never served on petitioner nor, to his knowledge, was the attachment ever effectuated. If it had been, he would have been entitled to an evidentiary hearing on a motion to set aside the attachment. Cal. Civ. Proc. Code § 485.010(c) (West Supp. 2001).

On June 14, 1995, respondent filed a motion in Marin County Superior Court for an order advancing the case for trial, and served petitioner with a copy of the motion, which stated that a hearing on the motion was scheduled for July 14, 1995, but which said nothing about a proposed new trial date. *Id.* at 698. Representing himself *in pro per*, petitioner did not oppose the motion to advance, but petitioner was never given the statutorily required notice of the advanced trial date once it had been set. As such, petitioner failed to appear, and trial of the claims and cross-claims took place in petitioner's absence. *Id.* The claims against petitioner were at all times contested, and no "default judgment" was entered as the Court of Appeal's opinion misstates. (Appendix A p. 1a, 8a).

At the conclusion of the trial, the court was persuaded to enter a judgment against petitioner for $102,286 plus costs, including attorney's fees of $43,009.87. *Id* at 698. Petitioner moved to set aside the judgment under Cal. Civ. Proc. Code § 473 (West Supp. 2001), which authorizes the trial court to grant a party relief from a judgment obtained as a result of the party's "mistake, inadvertence, surprise, or excusable neglect." The motion was denied and petitioner appealed. *Au-Yang, supra*, 987 P.2d at 698.

While the appellate process was still underway, petitioner was forced by means of a Washington State writ of execution obtained by respondent, to pay to respondent almost all of the net proceeds of the sale of his Washington family home in the sum of $174,245.45 (the amount of the judgment plus interest).

Petitioner's First Appeal: On April 22, 1997, the Court of Appeal for the First Appellate District, Division Two, affirmed the Superior Court's judgment against petitioner. Thereafter, he successfully petitioned the California Supreme Court for review. On November 18, 1999, that court filed its opinion reversing the Court of Appeal's decision, vacating the judgment, and remanding the case to the Marin County Superior Court for retrial because petitioner had not been given the statutory notice of trial.

Before its decision became final, petitioner informed the California high court of the large amount that respondent had collected in satisfaction of the vacated judgment, and that it was his life's savings. He moved in that court, pursuant to Cal. Civ. Proc. Code § 908, for restitution and an accounting to place the parties at *status quo ante*. On January 13, 2000, that court referred the motion to the Marin County Superior Court for determination. On February 24, 2000, after remittitur was issued by the Court of Appeal, petitioner renewed his motion with the trial court.

Superior Court's Abuse of Discretion: On March 24, 2000, the Superior Court filed a minute order, and on May 12, 2000, it entered a formal order "Appointing Escrow Agent and Denying Defendant's Motion for Restitution and Accounting." (Appendix B). In so doing the Superior Court ordered – without any finding that respondent would likely prevail on the merits – that whatever amount of petitioner's money respondent still held in her possession was to be

delivered to a mutually-agreed escrow agent and jointly controlled by the parties while awaiting retrial. This order was entered despite petitioner's arguments to the Superior Court that the withheld money was his life's savings and denial would violate his right to due process of law, since no evidentiary hearing was allowed and no posting of a bond by respondent required, both of which are provided for by the attachment law. Cal. Civ. Proc. Code § 484.040 and § 489.210 (West Supp. 2001).[1]

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1. In this case, for many reasons, respondent would have had difficulty showing in an evidentiary hearing the likelihood of recovering anywhere near the sum of money that is being held in escrow. These reasons include the fact that: (1) the deck in question has been continuously enjoyed for the past ten years without modification, repair or injury despite respondent's contention that it is so dangerous it must be demolished and replaced; (2) respondent refused petitioner's offer nine years ago to correct what she perceived to be defects in his performance; (3) the disproportionately large judgment entered against petitioner was the result of testimony – to which petitioner would have objected had he been present at the trial – given by two liability experts, both of whom were excluded from testifying by an *in limine* order filed 1½ years earlier (which respondent's counsel neglected to bring to the court's attention at the time the testimony was offered); and (4) the respondent had in 1992 successfully claimed damages against and received payment from petitioner's contractor's bond as a result of which she assigned to the bonding company part of her claim against petitioner. The bonding company later initiated and concluded litigation against petitioner for reimbursement. None of this was brought to the attention of the trial judge. In addition, evidence would have been introduced at such a hearing to demonstrate that, without at least partial restitution, petitioner would have no funds available to pay for the cost of defending against respondent's claims, and that the money the court ordered into escrow was community property belonging half to petitioner's spouse.

A hearing further would have enabled the parties to brief for the trial court the law governing the measure of damages in a non-

(Cont'd)

Petitioner's Second Appeal: On May 23, 2000, petitioner filed a notice of appeal challenging the constitutionality of the Superior Court's order denying restitution and requiring the escrow. On February 26, 2001, the Court of Appeal filed its opinion affirming the Superior Court's Order, a copy of which is found in Appendix A. That opinion affirms not only the denial of restitution and appointment of the escrow agent, but also the Superior Court's denial of petitioner's motion for an accounting and other ancillary relief. The California Supreme Court denied petitioner's timely filed petition for review and request for immediate stay of the proceedings, which he sought for the reason that the Superior Court had deprived him of the only funds he had with which to finance his defense against the underlying claims.

The Federal Issues Were Raised and Ruled on Below: Each of the issues presented by this petition was directly and expressly raised with the Court of Appeal and later in the Petition for Review filed with the California Supreme Court. As summarized by the Court of Appeal, "Appellant contends that [the] trial court abused its discretion under section 908 in denying restitution and that its ruling was unconstitutional by allowing his property to be taken without due process." (Appendix A, p. 2a). Without any prior

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(Cont'd)
injury negligent deck construction action. In this case, petitioner would have been able to demonstrate to the court that, under California law, respondent's recovery at retrial, presuming she prevailed on every issue, in any event would be limited to no more than the $28,501.31 agreed value of the deck if completed, less the amounts received from the bonding company, less amounts she failed to pay on the contract, and less the reasonable value of ten years enjoyment of the deck as constructed by petitioner. As such the $174,245.45 of which petitioner was being deprived could at the very least have been demonstrated to be excessive, even if the court found probable cause to believe that respondent would prevail at trial.

discussion of the constitutional issue, the Court of Appeal summarily rejected petitioner's due process argument at the conclusion of its opinion, in a manner that made it unclear whether the court even agreed that due process concerns were actually triggered.

According to the court:

> Appellant further argues that the court's order effectively imposed a prejudgment attachment without appropriate hearing or evidentiary showing and thus denied him due process. He relies on *Randone v. Appellate Department* (1971) 5 Cal.3d 536 and *Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337, which found procedural due process violations in statutes that allowed prejudgment attachment of a debtor's property without notice and hearing. The present situation is not comparable.

(Appendix A, pp. 7a-8a)

The court went on to state its opinion that, in any event, "[a]ppellant was not deprived of his property prior to notice and hearing" because, "[a]ppellant had notice and an opportunity to be heard at least at the point of his motion for relief from default." (Appendix A, p. 8a). Since no motion for relief from default was filed in this action, the Court of Appeal presumably meant to refer to the motion to set aside the judgment petitioner filed pursuant to Cal. Civ. Proc. Code § 473 prior to appealing from the judgment itself. From this statement, it appears that the Court of Appeal failed to recognize that, once the judgment was entered against petitioner following the first trial, and before the California Supreme Court reversed that judgment, he could not properly have sought restitution or argued that his due process rights

were violated in that context since he was obligated at that time to satisfy the standing judgment.[2]

The Superior Court's and the Court of Appeal's failure to pay careful attention to the due process issue was not in any way due to petitioner's lack of effort in presenting the federal issue. In petitioner's moving papers before the

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2. As further evidence that his due process rights, if any, were protected, the appellate court noted that petitioner "had notice at the time of the issuance in Washington State of the writ of execution on the judgment, and he voluntarily sold the property there to satisfy that writ." (Appendix A, p. 8a). This statement suggesting that due process concerns are satisfied because he was given notice of the writ of execution and because he *voluntarily* sold his home on his own, rather than have it fetch a lesser price at a sheriff's auction, is contrary to long-standing California law (cited to the Court of Appeal in petitioner's brief) articulated in *Schubert v. Bates*, 30 Cal. 2d 785, 792, 185 P.2d 793, 797 (1947) which declares unequivocally that the loss of Mr. Bartons home was not "voluntary":

> [P]ayment of money pursuant to decree, or surrender of possession of property pursuant to an adjudication of unlawful possession, although no execution issued, are not voluntary acts depriving the parties of rights relative to appeal or for restoration upon reversal of the judgment. The fact that in some cases benefits had been lost under the erroneous judgment pursuant to execution process, does not render futile the exercise of the power in cases where the only coercion was that of a judgment declaring the parties' rights and duties.

Thus, contrary to the implication in the Court of Appeal's opinion, a voluntary sale – with involuntary diversion of the proceeds – pursuant to a later-reversed judgment is not a proper basis for denying restitution. That the opinion makes reference to both the irrelevant notice of the writ of execution (which actually was the first notice petitioner had that the trial had taken place) and the "voluntary" sale of his home indicates Court of Appeal's confusion about the due process concerns which are implicated by the "discretionary" denial of restitution it upheld.

Superior Court, he explained why his due process rights would be violated by denying him the right to possess and use his own money:

> . . . Plaintiff's position does violence to the Code of Civil Procedure in that it would circumvent the requirements specified by the legislature for a party, pending trial, to secure -- by writ of attachment, temporary protective order, or the like -- property from which a judgment can later be paid. If Plaintiff perceives the need to follow such a course she is required to abide by the procedure outlined in the code.

In addition, the following exchange among others occurred on this subject at the hearing before the Superior Court:

Mr. David:

> Nonetheless, you have in effect substituted your judgment and your discretion for the attachment law that has been carefully prescribed by the legislature of the State of California.
>
> And, as a matter of fact, the reason the [current] attachment [law] exists is because the [California] Supreme Court found unconstitutional the previous attachment law of the State of California as a denial of due process.
>
> And . . . the current attachment law requires . . . a hearing. It requires an evidentiary showing; certain specific facts have to be found by the court before an attachment can be obtained.

And what your Honor has done here is to order that my client's money, which now belongs to him because the judgment has been declared void, can't go back to him. It goes into the hands of a third party which is no different than an attachment would be.

* * *

So that is . . . being done without any evidentiary showing, without the plaintiff having to assume the burden that the legislature requires her to assume to have an attachment issue.

It also prevents Mr. Barton from availing himself of any of the defenses to an attachment. For instance . . . There's been no evaluation at all as to how much of this 175,000 thousand dollars that she is holding is necessary to pay off a judgment of a 28,000 dollar dispute.

* * *

[I]t seems highly unjust, a violation of his due process rights, a violation of everything that the attachment law was designed to prevent, to order that his money remain unreachable by him.

All of the cases say that unless there are exceptional circumstances, that the money has to be returned forthwith.

* * *

If your Honor's ruling stands, then Ms. Auyang [sic.] is unjustly enriched because she is able to have the benefit of a prejudgment attachment

> without going through any of the procedures. She is being handed a writ of attachment without making any showing whatsoever.
>
> The other thing I would like to say, your Honor, is there is a case that you should read. It's a Federal case, discussing the constitutionality of attachment without a pre-attachment hearing . . . it's called *Tri State Development* versus *Johnston.* It's a 1988 case, a Ninth Circuit case. . . .

The Superior Court did not view the oral argument on the restitution motion as a vehicle to evaluate the merits of the case for purposes of complying with due process requirements. Indeed, at one point in the proceeding, respondent's counsel attempted to argue the merits of the claim, but the court cut him off cautioning "[n]ow we're back into the merits of the case." In ruling against petitioner, the court made ***no*** findings as to the probability that respondent would prevail in the action (Appendix B), and explained the reasoning for its Order as follows:

> We actually have a code section that tells us what to do in this case. You have not mentioned that in your argument. Code of Civil Procedure 908.
>
> It was in my [tentative] decision and it states: When a judgment is reversed or modified the reviewing court may – then it goes on to say – so its discretionary.
>
> In fact, the Supreme Court and the Court of Appeal didn't want to do it or didn't do it and they sent it back to this court to exercise that discretion.

* * *

> You argued throughout that we have to comply with the attachment rules here because otherwise it would be an unjust violation of due process.
>
> We have a statute that tells us what to do in that situation, and I did follow that statute, Section 908. And the other cases that I cited too which give the Court discretion. So I really would not change [the tentative ruling denying restitution and ordering the escrow] and would adopt that ruling.

Petitioner similarly argued in the Court of Appeal that, while § 908 itself imposes no limitations on the discretion it confers on appellate and trial courts to deny restitution, pre-judgment deprivations of property are authorized by this Court's decisions only after a defendant's due process rights are protected. In making this argument petitioner expressly relied on, discussed and quoted extensively in his appellate brief from, such cases as *Connecticut v. Doehr*, 501 U.S. 1 (1991); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), and *Sniadach, supra*, 395 U.S. 337, in which this Court required evidentiary hearings in connection with pre-judgment deprivations of property and/or discussed the factors to be considered in making a determination about whether due process has been satisfied.

The language of § 908, standing on its own, petitioner argued, does not contain constitutionally-mandated safeguards, but also does not authorize trial courts in exercising their discretion to confer *sua sponte* the equivalent of such ancillary/ provisional remedies. The Superior Court, he contended, applied § 908 in such a manner that created a conflict between that section and the statutes governing ancillary remedies, thereby infringing on constitutionally protected rights. Nonetheless, that Order was affirmed by

the Court of Appeal without any substantive due process discussion, citation to supporting precedent, or logical reasoning to support its decision.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeal Decision Denying Petitioner's Right to Certain Due Process Safeguards Appears to Conflict With Decisions of This Court

The Court of Appeal's opinion affirms the Superior Court's Order that petitioner be deprived of his money while he awaits retrial – as if it were the object of an attachment – without requiring respondent to satisfy any of the prerequisites of an attachment and without providing any safeguards whatsoever to afford petitioner his right to due process of law. In doing so, the appellate court held that the deprivation was authorized by the trial court's "inherent authority" and Cal. Civ. Proc. Code § 908 which leaves it to the court's discretion whether restitution following reversal will be granted. (Appendix A, p. 8a). The appellate court failed to appreciate the due process implications that arise when a satisfied judgment is reversed and remanded for retrial, in which case the deprivation caused by the denial of restitution is the virtual equivalent of a pretrial attachment.

The Court of Appeal's opinion did not so much as mention *Doehr*, although quotes from that decision formed the backbone of petitioner's due process argument. While there is no practical difference between a pretrial attachment and a denial of restitution, insofar as both result in pretrial deprivation, the Court of Appeal, without discussion, distinguished *Sniadach*, *supra*, 395 U.S. 337 in one sentence, declaring that "The present situation is not comparable." (Appendix A, p. 8a). In a further attempt to justify its conclusion that no evidentiary hearing was required in these

circumstances, it also summarily rejected as "unpersuasive" petitioner's contention that the Superior Court's discretionary denial of restitution violated statutes governing attachments, and the like. *Id.*

This Court has repeatedly made clear that specific procedural safeguards, including a hearing, are required when a defendant is to be deprived of his or her property while awaiting trial. *See, e.g., Doehr, supra*, 501 U.S. 1; *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach, supra*, 395 U.S. 337. In these cases, the question this Court has grappled with is not whether due process requires a hearing, but whether the hearing must take place prior to the deprivation, rather than promptly thereafter, and whether additional safeguards, such as the posting of a bond, are required. *See Doehr, supra*, 501 U.S. 1.

By holding that no evidentiary hearing is constitutionally-mandated before a court can properly deny restitution of money paid to satisfy a vacated judgment, the Court of Appeal in this case decided an important federal question in a way that clearly "seem[s] to be out of line with the [relevant] authorities" (*Braem v. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959)), and worse, "appear[s] to be in conflict with [this Court's] precedents" spanning more than 30 years (*Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982)).

II. Whether a Defendant Has the Right Not to Be Deprived, While Awaiting Retrial, of Money Paid to Satisfy a Judgment Which Was Later Vacated on Appeal Without Compliance With the Fourteenth Amendment's Due Process Requirements Presents an Important Federal Question

The federal question decided by the appellate court in this case is of particular importance for several reasons. *First*, it applies, not only to defendants in the State of California (in which the discretionary denial of restitution following a vacated judgment is governed by Cal. Civ. Proc. Code § 908) but also to all defendants who find themselves in federal court subject to the similarly discretionary Fed. Rule Civ. Proc. 60(b)(5) (28 U.S.C.A. § 1992),[3] as well as to those in other states which have modeled their legislation after the Federal Rules.

Second, those defendants whose due process rights are most vulnerable to the standardless nature of the current statutory scheme are the most severely injured by a violation of their constitutional rights, and least able to mount a challenge. This is apparent because, if a defendant has the financial wherewithal to put up the collateral necessary to bond 150% or 200% of the award pending appeal, the question of restitution following the reversal of an erroneous judgment is never raised since the collateral is returned by the bonding company upon reversal when the bond is discharged.[4]

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3. The rule states that "[o]n motion and upon such terms as are just, the court ***may*** relieve a party . . . from a final judgment, order or proceeding . . . [if] a prior judgment upon which it is based has been reversed or otherwise vacated. [Emphasis added]"

4. "The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in (Cont'd)

It is only when a defendant, like petitioner herein, cannot afford to post a bond (or make a cash deposit with the court in lieu of bond pursuant to Cal. Civ. Proc. Code § 995.710) (West Supp. 2001)) that he or she is left to suffer the consequences of a collection enforcement procedure on the erroneous judgment while the appellate process is underway. It is this especially vulnerable group of people who find themselves in the unfortunate position that petitioner finds himself in. Their due process rights are unacknowledged and unprotected and their ability to challenge a denial of restitution is inhibited, if not prohibited, by lack of funds caused by the enforcement of the later vacated judgment followed by a denial of restitution. Thus, the wealthy among us receive restitution automatically on reversal, while those less fortunate are deprived of their money, may lose their ability to pay a lawyer and thereby have a state-sanctioned, disadvantaged day in court.

Third, due to the perceived "temporary" nature of benignly-described deprivations (*i.e.* "safekeeping" of the money) suffered by defendants finding themselves in the same predicament as petitioner, the question presented herein has not been addressed head-on in the published legal precedent; at least we have found no California state or United States Supreme Court decision which deals directly with due process considerations in this restitution context.

(Cont'd)

which event it shall be for one and one-half times the amount of the judgment or order." Cal. Civ. Proc. Code § 917.1 (West Supp. 2001). "A bond remains in force and effect until the earliest of the following events: . . . (b) The purpose for which the bond was given is satisfied . . ." Cal. Civ. Proc. Code § 995.430 (West Supp. 2001). "A bond given in an action or proceeding may be withdrawn from the file and returned to the principal on order of the court only if one of the following conditions is satisfied: . . . (b) the bond is no longer in force and effect . . ." Cal. Civ. Proc. Code § 995.360 (West Supp. 2001).

Despite the fact that the issue is certainly faced by trial courts with some regularity after a case is reversed, there have been no restitution opinions of any nature published in California since the 1970's. Significantly, none of the reported Cal. Civ. Proc. Code § 908 restitution cases in California postdate the effective date of its attachment law that was revised to include the constitutionally-mandated prerequisites necessitated by the case of *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 540, 96 Cal. Rptr. 709, 710, 488 P.2d 13, 14, *cert. denied*, 407 U.S. 924 (1971) which relied upon this Court's seminal decision in *Sniadach*, *supra*, 395 U.S. 337.

We suspect this lack of case law specifically addressing these due process considerations is accounted for by the fact that hapless defendants who are denied restitution forego seeking interim appellate relief because of the uncertainty and expense of mounting such a challenge, coupled with the likelihood that before the Appellate Court can act, the underlying action will be concluded – with the deprivation unabated – thereby rendering the injury truly irreparable and the issue moot.

The federal question presented by this petition is not only important because of its constitutional nature, but also because of the widespread application a pronouncement of the law on this subject would have. Since individuals with the least resources are the ones whose due process rights are most likely to be violated under the current restitution scheme, it is a subject that by its very nature is unlikely to be addressed in published appellate opinions, leaving state and federal courts alike in need of guidance from this Court.

In addition, the fact that the Court of Appeal's opinion in this case was ordered "not to be published" does not mean no harm has been done. Rather, the ambiguity in this area of law that led to the opinion in the first place remains the

status quo, leaving litigants' due process rights unprotected and vulnerable to the unfettered discretion of individual judges, not all of whom are able to recognize the importance of the constitutional interests at play.

This Court's silence on the subject is being taken by an unknown number of courts across the country, including the Superior Court and apparently the Court of Appeal in this case, as an indication that no due process requirements fetter their discretion, which has the prejudicial and undesirable effect that individual defendants (even those in the same county, but before different judges) receive disparate treatment that goes unchallenged.[5]

The practical result of this sad situation is that financially vulnerable litigants, like petitioner herein, may be forced to settle the claims against them – or be defeated at trial – simply because they have been denied access to the only money they have to fund a retrial on the merits. As a further result, courts can grant or deny restitution under § 908 (or Fed. Rule. Civ. Proc. 60(b)(5)) at their unfettered absolute discretion without evidence showing the likelihood of the plaintiff's recovery, without a hearing, and without rudimentary due process.

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5. Although there is evidence that some courts get it right, there has been no word even from them regarding the fundamental due process concerns involved with the subject of restitution. In *Cal. Med Ass'n v. Shalala*, 207 F.3d 575 (9th Cir. 2000), Judge Kozinski rejected the notion that such discretion under the Fed. Rule Civ. Proc. 60(b)(5) can be exercised in any manner. Judge Kozinski reminded the district court that "[w]hile the rule allows for the exercise of discretion, a district court abuses its discretion" when failing to order immediate restitution of attorney's fees that were paid before the district court's decision was reversed on appeal. *Id.* at 578. As further explained by Judge Kozinski, "Since the fee award is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award." *Id.* at 577-78. As such, the Ninth Circuit held the district court's refusal to grant restitution to be an abuse of its discretion.

This case presents a rare opportunity to this Court to protect the rights of these most vulnerable of litigants, an opportunity similar to that seized in *Sniadach*, *supra*, 395 U.S. 337, wherein this Court reversed a $63.18 pretrial garnishment causing states across the nation to revise their attachment statutes to conform with the due process rights protected by the Fourteenth Amendment.

The State of California has turned its back on Mr. Barton's Fourteenth Amendment rights. This honorable Court is his last refuge to consider the important question presented herein. He urges the Court to announce loudly and clearly that restitution prior to retrial in these circumstances cannot be denied without the provision of the same safeguards as this Court has required in connection with other forms of pretrial property deprivations.

III. This Court Should Require That the Statute Utilized to Deny Restitution in this Case, and All Similar Rules of Procedure, Be Implemented in a Manner That Provides Due Process Protection Against Erroneous Deprivation of Property Consistent With Its Decisions Requiring Such Safeguards in Attachment and Garnishment Proceedings

California Civ. Proc. Code § 908, by its language, and as implemented by the Superior Court in this case, authorizes a trial or appellate court to exercise its discretion in denying restitution following reversal without prescribing any standards as to how that discretion is to be exercised or any procedural safeguards to protect against erroneous deprivation of property. Similar state statutes – as well as Fed. Rule Civ. Proc. 60(b)(5) – which authorize courts to grant relief to a defendant following reversal of a judgment, likewise provide no standards to assure that they will be applied in a constitutional manner.

Due process protection is invoked in restitution-following-reversal proceedings because of the fact that the defendant is deprived of property that actually belongs to him or her. At the time the erroneous judgment is vacated, the deprivation has already occurred. No post reversal deprivation hearing takes place because the statutes do not provide for such a procedure. This is the scenario that exists under the current state of the law, even though this Court has held over and over again in equivalent circumstances in which a pretrial deprivation of property may occur, that due process concerns are triggered.

This Court has been clear and consistent in its holdings that deprivation of property need not be permanent in order to trigger constitutional protection. Nor does the length of a temporary deprivation impact the right to procedural safeguards. In addition, the type and amount of property of which a litigant is deprived is not determinative. *See, e.g., Sniadach, supra*, 395 U.S. at 377; *Fuentes, supra*, 407 U.S. 67; *North Georgia Finishing, supra*, 419 U.S. 601; *Doehr, supra*, 501 U.S. 1.[6]

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6. In *Sniadach, supra*, 395 U.S. 337, this Court found a temporary taking of $63.18 in wages to constitute a sufficient taking of property to trigger due process without even discussing whether the amount in question was too little to require a pretrial evidentiary hearing. In *Doehr, supra*, 501 U.S. 1, this court found a temporary $75,000 attachment (applicable to the litigant's home) to trigger constitutional protection. In *Fuentes, supra*, 407 U.S. at 84, this Court held that even where "the chattels at stake were nothing more than an assortment of household goods," it was "[n]onetheless . . . clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment." In *North Georgia Finishing*, this Court similarly found the impounding of funds in a bank account prior to trial to constitute a deprivation triggering due process protection explaining:

(Cont'd)

There should be little quarrel that the deprivation at issue in this case is sufficient to trigger due process protection. A defendant's deprivation of money or property pending retrial of a reversed judgment is the same whether it results from an attachment or denial of restitution of money paid to satisfy a vacated judgment. Although this Court has not spoken on the issue of due process concerns arising in the latter context, the reasoning articulated in its attachment and garnishment decisions applies. Only when there is "a hearing to determine the likelihood of recovery" can a pretrial deprivation of property, whether it be by attachment, garnishment or impound, be permitted. *See Doehr, supra*, 501 U.S. at 16. This is – at minimum – a safeguard that petitioner herein was entitled to, but did not receive.[7]

(Cont'd)

> Here, a ***bank account, surely a form of property***, was impounded and, absent a bond, put ***totally beyond use during the pendency of the litigation*** on the alleged debt, all by writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.
>
> * * *
>
> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. ***We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.*** [Emphasis added]. *Id.* at 606, 608.

7. In fact, if respondent were not already in possession of petitioner's money and attempted to seek a pretrial attachment, she

(Cont'd)

IV. In the Context of Restitution Following Reversal, the Plaintiff Should Be Required to Put up a Bond if Restitution is Denied

According to this Court, "A procedural rule that may satisfy due process for attachments in general, [citation omitted], does not necessarily satisfy procedural due process in every case." *Sniadach, supra*, 395 U.S. at 340. Indeed, this Court in *Mathews, supra*, 424 U.S. at 335-36, set forth a three-part test applicable to the determination of what procedure is required in a given context. The three factors include: (1) consideration of the private interest to be affected by the prejudgment measure; (2) an examination of the risk of erroneous deprivation by the challenged procedures and the probable value of additional safeguards; and (3) the interest of the party seeking the prejudgment remedy with due regard for any concomitant governmental burdens attendant to adding greater protections.

(Cont'd)

would not be eligible. California's legislature has specified that in order to be eligible for an attachment the underlying claims must be for a ***fixed or readily ascertainable amount***. Cal. Civ. Proc. Code § 483.010(a) (West Supp. 2001). In applying § 483.010 the courts have also held that the money claimed in a contract action must be for an amount of damages measurable by reference to the contract itself. *See, e.g., Hobbs v. Weiss*, 73 Cal. App. 4th 76, 86 Cal. Rptr. 2d 146 (1999). "[T]he damages [must be] readily ascertainable by reference to the contract and the basis of the computation of damages appears to be reasonable and definite." *Stotland v. Mobile Homes Engineering Corp.*, 197 Cal. App. 2d 815, 818, 17 Cal. Rptr. 591 (1962). The measure of the damages claimed by respondent in this case cannot, however, be ascertained without expert opinion as evidenced not only by the nature of her claims but also by her reliance on expert testimony at the trial in petitioner's absence. It is grossly unfair for the courts to allow her to accomplish under § 908 a result without due process safeguards that is prohibited by § 481.010, *et seq.* even with the statutory safeguards in place.

Based on this analysis, the question of whether or not the posting of a bond is required for prejudgment attachments in addition to a pre-deprivation hearing, has been hotly debated by this Court. In *Doehr*, four justices expressed the view that a bond was necessary. This important question is now ripe for decision and this case presents exactly the circumstance in which the posting of a bond should be deemed constitutionally-mandated.

This Court determined via application of the *Mathews* factors that the heightened risk of erroneous deprivation existing in cases that involve multiple questions of fact, in contrast with uncomplicated debt collection cases, for example, requires that the evidentiary hearing occur prior to the deprivation of property. *See Mathews*, *supra*, 424 U.S. at 332 (because the decision whether to continue disability benefits in most cases turns on routine, standard and unbiased medical reports by specialist physicians, the potential value of a pre-deprivation evidentiary hearing is substantially less); *compare*, *Fuentes*, *supra*, 407 U.S. 67 (wherein pre-deprivation hearing was required even though the underlying action was not factually complex).[8]

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8. Under the Connecticut statute at issue in *Doehr* defendants were afforded several safeguards, including an expeditious post-attachment adversary hearing, notice of the hearing, judicial review and a double damages action if the original suit was commenced without probable cause. Nevertheless, this Court held, ". . . the procedures of almost all the States confirm our view that the Connecticut provision before us, by failing to provide a pre-attachment hearing without at least requiring a showing of some exigent circumstances, clearly falls short of the demands of due process." 501 U.S. at 18. On the same subject, this Court in *Fuentes*, *supra*, 407 U.S. at 81-82 held:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a

(Cont'd)

A contested construction case such as this does not concern "ordinarily uncomplicated matters that lend themselves to documentary proof." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 609 (1974). Rather, disputed facts in the underlying action include whether the deck is sound or needs to be demolished; the value to respondent of 10 years' uninterrupted use of the unmodified deck as built by petitioner; whether the plaintiff defrauded the defendant, and other questions not easily proved by documentation or declaration evidence. Moreover, respondent's mental state is at issue due to petitioner's cross-claim for fraud.

While the negligence and contract claims at hand, like those in *Doehr*, are factually complex, there is no opportunity after a satisfied judgment that has been vacated to have a "pre-deprivation" hearing since the defendant's property is already in the plaintiff's hands. Thus, as a substitute safeguard for the impossible safeguard of a pre-deprivation hearing necessitated in such cases, this Court should hold that the immediate posting of a bond – well in excess of the amount at issue – by plaintiff is required to be in place while the deprivation continues.

The safeguard of a bond is particularly suited to a case like this in that respondent's refusal to pay (and the courts' refusal to order) restitution pending retrial has resulted in

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(Cont'd)

> time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647.

irreparable harm to petitioner for which he should be allowed to recover to the extent the harm is compensable, should respondent lose at trial, without having to incur yet further expense by instituting new proceedings. As Justices Marshall, Stevens, O'Connor and White agreed in *Doehr*, *supra*:

> A defendant's property rights remain at undue risk even when there has been an adversarial hearing to determine the plaintiff's likelihood of recovery. At best, a court's initial assessment of each party's case cannot produce more than an educated prediction as to who will win. This is especially true when, as here, the nature of the claim makes any accurate prediction elusive. 501 U.S. at 20.

V. The Injustice Caused By The Court of Appeals Decision Is Grave

Petitioner was improperly deprived of his property without due process in the underlying action when he was not given notice of the trial. Now he is being deprived of his property a second time without a hearing to determine whether the respondent will likely recover. He has *never* had a hearing but has been deprived of his money for four years.

The consequences of the Court of Appeal's decision to hold Mr. Barton's money in "safekeeping" has placed petitioner in grave financial jeopardy because that decision will imperil his ability to engage experts and otherwise defend himself in this very action which is ongoing.

Although the money of which he is being deprived is unquestionably his own, earned during the course of a lifetime, by being denied access to it, petitioner is prevented from funding his legal defense as if he were a convicted

criminal and the money were the ill-gotten fruits of his crimes. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). Surely the Fourteenth Amendment does not countenance such a devastating outcome.

While the underlying matter was on appeal from the 1995 judgment, petitioner was diagnosed with cancer. He is required to support his family on his approximately $3,000 per month disability pension from the San Francisco Police Department, with no money left over to fund his defense or the prosecution of his cross-claims. He has already been forced to take a second mortgage on his current home in order to cover his family's living expenses.

Respondent's interest at stake is *de minimis* in that it is merely to ensure the availability of assets to satisfy a *potential* judgment. Respondent's interest in avoiding the additional burden of having to show in a hearing the likelihood of her success on the merits, and the burden on the State in conducting such a hearing, also pale in comparison to the overarching interest of petitioner in protecting his property from being erroneously temporarily confiscated without due process of law.

CONCLUSION

The California Court of Appeal, First Appellate District – ***without*** any evidence that petitioner would be inclined to make his assets unavailable in the event of a judgment, ***without*** requiring a bond from respondent, ***without*** hearing any evidence on the merits of the dispute, ***without*** allowing petitioner an opportunity to contest the claims on the merits including the right of cross-examination, ***without*** addressing the appropriateness of the amount being withheld from petitioner in relation to the amount at issue in the contract dispute, ***without*** determining whether petitioner has the right

to any exemption, ***without*** allowing petitioner to show that half the money at issue belongs to his spouse under the applicable community property laws, ***without*** examining the measure of damages obtainable in a non-injury negligent deck construction case – held that it was reason enough for the trial judge to deny restitution and *sua sponte* order petitioner's money escrowed because "[p]lacing the money in an escrow account guarantees its continued safekeeping until the merits are finally determined." (Appendix A, p. 7a).

If the "safekeeping" reasoning of the Court of Appeal were the sole constitutional criterion necessary to deprive a litigant of his or her property pending trial, it would be unnecessary for there to be any attachment laws in this country with their attendant constitutionally mandated procedural safeguards which this Court has so carefully prescribed.

For the foregoing reasons, this petition for writ of certiorari should be granted.

In the alternative, petitioner suggests, in view of the apparent conflict of the decision below with past decisions of this Court, that it consider summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION TWO FILED FEBRUARY 26, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

A091359

(Marin County Super. Ct. No. 153217)

SUSAN AU-YANG,

Plaintiff and Respondent,

v.

NEIL BARTON, et al.,

Defendant and Appellant.

I. INTRODUCTION

Neil Barton appeals from an order appointing an escrow agent and denying his motion for restitution and accounting of funds held by respondent Susan Au-Yang to satisfy a default judgment she had obtained against appellant. After the default judgment was reversed by the California Supreme Court, appellant filed a motion for restitution and accounting, which was denied. He then brought this appeal. (Code Civ.

Proc., § 904.1, subd. (a) (5)(6)(7).)[1] Appellant had also sought review by petition for writ of mandate, which we summarily denied on June 20, 2000. The underlying case has not yet been retried.

Appellant contends that trial court abused its discretion under section 908 in denying restitution and that its ruling was unconstitutional by allowing his property to be taken without due process. We will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case has a long and contentious history stemming from a dispute about the quality of construction work done by appellant on respondent's Mill Valley home in 1991. The contract called for appellant to replace a deck for a cost of $28,501.31. In April 1992, respondent filed suit, alleging that appellant had negligently performed the work and seeking damages in excess of $60,000. After several continuances, trial was set for February 16, 1995. Shortly before the trial date, appellant's attorneys withdrew from the case and appellant, who had moved to the State of Washington, filed a petition for bankruptcy. Because of the bankruptcy filing, the Marin County Superior Court reset the case for trial on October 12, 1995. The bankruptcy petition was dismissed in May 1995.

On June 14, 1995, respondent filed a motion for an order advancing the case for trial. Appellant was served with a

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1. Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

copy of the notice, which said that the hearing on the motion was set for July 14, 1995. Appellant did not appear at the July 14, 1995, hearing. At that hearing, the trial court vacated the October 12 trial date, scheduled a status conference on July 20, 1995, which was then postponed until July 27, 1995. On July 27, 1995, the court set the trial date as August 10, 1995.

On the August 10 trial date, appellant failed to appear. A default judgment was entered against him for $102,286 plus costs and attorney's fees totaling $43,009.87. In September 1995, appellant moved to set aside the judgment on the ground that he had not received notice of the trial date. The motion was denied on November 6, 1995.

On February 17, 1995, respondent had obtained ex parte a pretrial writ of attachment from the Marin County Superior Court giving her the right to attach appellant's residential property at 5209 Vine Court in Olympia, Washington, to secure the amount of $80,000. The writ of attachment was recorded in Thurston County, Washington, on February 23, 1995. The writ was granted to provide assurance that respondent could collect on a judgment she might obtain.

On July 3, 1996, a writ of execution was issued by the Superior Court of Thurston County, Washington, to satisfy the default judgment respondent had obtained against appellant. The sheriff was ordered to sell the property at 5209 Vine Court on August 23, 1996. Appellant sold the property himself to avoid the sheriff's sale. The settlement statement, dated August 29, 1997, showed that appellant was required by the writ of execution to pay $174,245.45 into the trust fund of respondent's attorneys.

Appendix A

On April 22, 1997, we affirmed the judgment. The Supreme Court thereafter granted review and, on November 18, 1999, ordered the judgment reversed and remanded for further proceedings.

Before the Supreme Court's decision became final, appellant moved in that court for an accounting and for restitution pursuant to section 908. The Supreme Court referred the motion to the trial court for determination.

Appellant renewed the motion in the trial court. On March 24, 2000, the trial court filed a minute order, and on May 12, 2000, entered a formal order denying appellant's motion. Instead, the court ordered respondent to place the funds in a trust account to be jointly controlled by the parties and delivered to a mutually agreed upon escrow agent pending retrial.

III. DISCUSSION

Appellant contends that the court abused its discretion under section 908 in denying him restitution. Section 908 provides: "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may

take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination."

Section 908 provides that the appellate court may order restitution, but this is rarely done. Relief is ordinarily sought in the trial court, which has inherent power to order it independent of the statute. (*Schubert v. Bates* (1947) 30 Cal.2d 785, 789; *Bank of America, etc., v. McLaughlin* (1940) 37 Cal.App.2d 415, 417; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 785, p. 820.) Whether restitution is sought by motion in a summary proceeding or by bringing an independent action, "the moving party has no absolute right to an order for restitution but the granting or denying of the motion rests in the sound discretion of the court to which the motion is addressed." (*Bank of America, etc., v. McLaughlin*, *supra*, 37 Cal.App.2d at p. 418.) The court may deny restitution when it would be inequitable to grant such restitution. (*Ibid.*) The trial court's ruling will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. (*Rogers v. Bill & Vince's, Inc.* (1963) 219 Cal.App.2d 322, 325.)

Appellant argues that the normal rule is that a party who obtains a reversal of the judgment is entitled to restitution unless exceptional circumstances are presented. He relies on language to that effect in *Rogers v. Bill & Vince's, Inc.*, *supra*, 219 Cal.App.2d at page 325, and cites a number of other cases in which restitution was ordered. (See, e.g., *Rogers v. Bill & Vince's, Inc.*, *supra*, 219 Cal.App.2d 322; *Holmes v. Williams* (1954) 127 Cal.App.2d 377; *Erickson v. Boothe* (1954) 127 Cal.App.2d 644; *Stockton Theatres, Inc.*

v. Palermo (1953) 121 Cal.App.2d 616; *Schubert v. Bates*, *supra*, 30 Cal.2d 785; *Levy v. Drew* (1935) 4 Cal.2d 456; *Ward v. Sherman* (1909) 155 Cal. 287; *Ashton v. Heydenfeldt* (1899) 124 Cal. 14.)[2] Many of cited cases differ from the present one in that no retrial was contemplated.

Different considerations are at play when there is to be a retrial. As Witkin explains: "If the reversal itself finally determines the rights of the parties, restitution should normally follow as a matter of right. But if the reversal calls for a new trial, the successful appellant may lose again, and the new judgment against him may be similar to the one that caused him to lose his property. [¶] This uncertainty has led to some conflict whether restitution in these cases is a matter of right. 'Even where the reversal is not conclusive of the rights of the parties, as where a new trial is ordered or the cause remanded for further proceedings, some courts, speaking of restitution as an absolute right, hold that it must be made without consideration of what the further result of the litigation may be, because otherwise the court might be required to determine, on motion or by an independent action, the final judgment to be made in the litigation. Other courts, noting the equitable character of the right to restitution, hold that it is not a matter of mere right, but is ex gratia, resting in the exercise of a sound discretion, and that the court will not order it where the justice of the case does not call for it

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2. Appellant also cites *California Medical Assn. v. Shalala* (9th Cir. 2000) 207 F.3d 575 as indicating a similar rule. In that case, however, the court merely held that reversal on the merits required reversal of the attorney fee award as well because the reversal of the merits removed the underpinnings of the fee award. (*Id.* at pp. 577-578.)

or where retention is not shown to be contrary to equity and good conscience.' (*Rogers v. Bill & Vince's* [*supra*] 219 C.A.2d 322, 326.)" (9 Witkin, Cal. Procedure, *supra*, § 788, pp. 821-822.)

In the present case, the trial court followed the latter rule and determined a different course was warranted. The court used its discretion to order respondent to place the money in a trust account with a mutually selected escrow agent with the account to be controlled by both parties. We find this an appropriate exercise of discretion under the circumstances. The parties in this case have been extremely contentious, and charges of abuse and bad faith have been advanced by each side. Placing the money in an escrow account guarantees its continued safekeeping until the merits are finally determined.

Appellant's complaints about the court's refusal to order an accounting or to order restitution of interest or profits earned on the money are answered by the same reasoning. It appears to have been within the court's discretion to deny those requests at the present time. The money has been ordered into an escrow account under the control of both parties. Presumably, appellant will be able to determine the amount of funds in the account and will have a final accounting when the case is finally decided.

Appellant further argues that the court's order effectively imposed a prejudgment attachment without appropriate hearing or evidentiary showing and thus denied him due process. He relies on *Randone v. Appellate Department* (1971) 5 Cal.3d 536 and *Sniadach v. Family Finance Corp.*

(1969) 395 U.S. 337, which found procedural due process violations in statutes that allowed prejudgment attachment of a debtor's property without notice and hearing. The present situation is not comparable. Appellant was not deprived of his property prior to notice and hearing. Appellant had notice and an opportunity to be heard at least at the point of his motion for relief from default. He also had notice at the time of the issuance in Washington State of the writ of execution on the judgment, and he voluntarily sold the property there to satisfy that writ.

Appellant's claims that the court's action violated other statutes governing attachments, deposits, receivers and injunctions are likewise unpersuasive. The court acted pursuant to its inherent authority and section 908.

IV. DISPOSITION

The order is affirmed. The parties are to bear their own costs on appeal.

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Haerle, J.

We concur:

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Kline, P.J.

_____

Lambden, J.

APPENDIX B — ORDER OF THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF MARIN APPOINTING ESCROW AGENT AND DENYING DEFENDANT'S MOTION FOR RESTITUTION AND ACCOUNTING DATED AND FILED MAY 12, 2000

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Cross-Complainant Neil Barton

SUPERIOR COURT FOR THE
STATE OF CALIFORNIA
COUNTY OF MARIN

Civil No. 153217

SUSAN AU-YANG,

Plaintiff,

vs.

NEIL BARTON, individually and dba NEIL BARTON CONSTRUCTION; Does 1 through 10, inclusive,

Defendants.

and related CROSS-COMPLAINT,

Appendix B

ORDER APPOINTING ESCROW AGENT AND DENYING DEFENDANT'S MOTION FOR RESTITUTION AND ACCOUNTING

The motion of Defendant Neil Barton, for an order granting restitution and accounting, came on regularly for hearing by the Court on March 24, 2000, at 9:00 a.m. Defendant appeared by counsel Anthony P. David; plaintiff Susan Au-Yang appeared by counsel Franklin Gordon.

Upon proof made to the satisfaction of the Court, and good cause appearing therefor:

IT IS ORDERED that Plaintiff shall place the monies now held in a trust account with a mutually selected escrow agent, such account to be controlled by both parties. (See plaintiff's declaration, ¶8, and defendant's evidence, Exh. E.) In deciding this motion and in fashioning relief, the court retains considerable discretion. (See, e.g., Bank of America v. McLaughlin (1940) 37 Cal.App.2d 415, and Hansen v. D'Artenay (1936) 13 Cal.App.2d 293, 297) The creation of such account will be consistent with plaintiff's assumed role as a trustee of the property. (See, e.g., Erickson v. Boothe (1954) 127 Cal.App.2d 644, 648, and Rogers v. Bill & Vince's Inc. (1963) 219 Cal.App.2d 322, 325.) This approach also would prevent any unjust enrichment of the plaintiff. (See Rogers, Supra, 219 Cal.App.2d at 325.)

IT IS FURTHER ORDERED that in all other respects, defendant's motion for restitution and accounting is denied.

Appendix B

DATED: May 12, 2000

s/ [stamp] VERNON F. SMITH
Judge of the Superior Court

Approved as to form:

s/ Franklin Melius Gordon
Franklin Melius Gordon, Esq.
Attorney for Plaintiff

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING APPLICATION FOR STAY AND PETITION FOR REVIEW FILED APRIL 18, 2001

Court of Appeal, First Appellate District, Division Two – No. A091359
S096578

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUSAN AU-YANG,

Plaintiff and Respondent,

v.

NEIL BARTON,

Defendant and Appellant.

Application for stay and petition for review DENIED.

s/ [stamp] WERDEGAR
Acting Chief Justice